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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

IN RE:
FERNAND L. LAUDUMIEY, III
and
DENNIS S. MANN,

Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Must the Louisiana Attorney Disciplinary Rules and Procedures which cover the disbarring of attorneys comply with both procedural and substantive due process?

1. Are the notice requirments of procedural due process infringed by application of permanent disbarment rules where permanent disbarment was not a penalty when Petitioners wrongfully influenced prospective Grand Jury witnesses?

2. Does "fundamental fairness" and "fair warning" require that the punishment of permanent disbarment be known at the time of wrongful conduct?

3. Does the Louisiana unitary system of lawyer discipline violate the requirements of an impartial tribunal by its combination of prosecutorial and adjudicatory functions?

4. Must a lawyer be disbarred upon conviction beyond a reasonable doubt or may lesser standards: "clear and convincing evidence," "moral fitness to practice law" and "fitness to practice law" suffice as adequate standards free of vagueness?

II. May Louisiana's new Supreme Court Rules providing for a penalty of permanent disbarment be applied retroactively without violating the constitutional prohibition against state *ex post facto* laws?

LIST OF PARTIES

Counsel of record for Petitioners certifies that the following are parties and counsel who have an interest in the outcome of this case:

Fernand L. Laudumiey, III, formerly an attorney at law of New Orleans, Louisiana;

Dennis S. Mann, formerly an attorney at law of New Orleans, Louisiana;

The Supreme Court of Louisiana, the legal entity having plenary power over membership in the Bar of Louisiana;

The Louisiana Attorney Disciplinary Board, a statewide agency established by the Supreme Court of Louisiana to administer the lawyer discipline and disability system;

Charles P. Plattsmier, Chief Disciplinary Counsel, Louisiana Attorney Disciplinary Board, Baton Rouge, Louisiana, counsel with prosecutorial authority in this cause;

William A. Porteous, III, of New Orleans, Louisiana, Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI

Fernand L. Laudumiey, III and Dennis S. Mann, Petitioners, hereby petition the Court to issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Louisiana in Attorney Disciplinary Proceedings entered on June 27, 2003.

OPINION BELOW

The opinion of the Supreme Court of Louisiana, which is reproduced in Appendix A commencing at page 1a, is officially reported at 2003 B 0234 (La. 6/27/03), 849 So.2d 515.

JURISDICTIONAL GROUNDS

The decision of the Supreme Court of Louisiana was entered on June 27, 2003 (App. A, p. 1a). This court has jurisdiction to review the decision of the Supreme Court of Louisiana on writ of certiorari pursuant to 28 U.S.C. Section 1257.

STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, Sec. 10, Clause 1, which states in pertinent part that "No state shall . . . pass any . . . *ex post facto* law."

U.S. Const. amend. XIV, Sec. 1, which states in pertinent part that "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Louisiana Supreme Court Rule XIX, Appendix H.

STATEMENT OF THE CASE

Petitioners were permanently disbarred by judgment of the Supreme Court of Louisiana on June 27, 2003 (App. A, p. 18a). The judgment became final July 11, 2003. The basis for the disbarment of petitioners was their plea and conviction of obstruction of justice, a federal criminal offense. Petitioners acted improperly relative to prospective witnesses before a federal grand jury.

Petitioner pled guilty in the United States District Court for the Eastern District of Louisiana on March 14, 2001. Petitioners voluntarily and by joint consent surrendered their licenses to practice law in Louisiana on an interim basis on April 11, 2001. The Supreme Court of Louisiana on that date ordered that disciplinary proceedings be instituted.

At the time of the offense of Petitioners, a lawyer who was disbarred might apply to the Supreme Court five years after disbarment and seek readmission to the Bar. Readmission was at all times discretionary under the plenary power of the Supreme Court of Louisiana to control membership in the Bar.

The Louisiana Attorney Disciplinary Board acting through its Disciplinary Counsel brought charges for improper conduct by a lawyer against Petitioners and these proceedings were instituted on the 23rd day of July, 2001. The Disciplinary Board, acting through Disciplinary Counsel, sought the "disbarment" of Petitioners on account of conviction of a serious crime, a crime involving the administration of justice. On August 22, 2001, the Disciplinary Counsel filed a supplemental charge seeking "permanent disbarment."

Petitioners admitted their conviction and the only issue for trial was the severity of the punishment.

At the time of the commission of the criminal offense by Petitioners, a Louisiana disbarred lawyer could apply

for readmission to the Bar after being disbarred for five years. Subsequent to the commission of the offense and the institution of a prosecution by the Louisiana Disciplinary Board, the Louisiana Supreme Court amended its disbarment rule to provide for permanent disbarment for what were egregious offenses. This Amended Section 10 of the Rule XIX was effective August 1, 2001. (See App. H, pp. 81a, 92a).

In Louisiana, the Supreme Court, pursuant to its rules, has a Disciplinary Board whose responsibility is attorney discipline and disability. (App. H, p. 81a). The Attorney Disciplinary Board appoints a Disciplinary Counsel as a prosecutor and the Supreme Court of Louisiana must approve the appointment of the Disciplinary Counsel (App. H, p. 85a). Prosecution of attorneys for violations of the Rules of Professional Conduct is instituted by the Disciplinary Counsel after investigation of an alleged offense and prosecution can only be initiated after clearance by a committee of the Louisiana Disciplinary Board and the members of that Committee do not thereafter sit in judgment on an attorney. (App. H, pp. 84a, 85a, 89a). The Supreme Court may also order the initiation of disciplinary proceedings.

Offenses against the Rules of Professional Conduct are tried before a Hearing Committee appointed by the Louisiana Disciplinary Board consisting of two lawyer members and one public member. (App. H, pp. 83a-84a, 89a). After a case is tried by a Hearing Committee, the Hearing Committee enters findings which are then reviewed in the nature of an appeal before the Louisiana Attorney Disciplinary Board sitting in panels of three involving two attorneys and one public member. This committee of the Louisiana Attorney Disciplinary Board performs the function of an intermediate court of appeal reviewing issues of fact and law with full power to

change recommendations as to appropriate sanctions. (App. H, pp. 83a, 90a).

After proceedings are held with briefs and oral arguments before the Louisiana Attorney Disciplinary Board, a disciplinary matter is then referred to the full Supreme Court of Louisiana where again there is a hearing after briefs and arguments and the Supreme Court of Louisiana, after reviewing the record, renders a decision as to the discipline to be imposed. (App. H, p. 91a). In this case, the Supreme Court of Louisiana imposed permanent disbarment upon Petitioners although that was not a declared sanction at the time Petitioners committed their offense.

Petitioners objected to the *ex post facto* quality, of the efforts to impose permanent disbarment upon them from the Hearing Committee level through the Disciplinary Board and at the Supreme Court of Louisiana. Petitioners also objected to the unitary system of discipline wherein the prosecutorial and adjudicatory functions are combined in a unitary system in Bar disciplinary matters. Petitioners also objected to the constitutionally vague standards for judging lawyer misconduct. The preservation of the constitutional issues of due process of law and *ex post facto* issues herein are found in: Peremptory Exceptions Raising Constitutional Issues (App. D), the Findings of the Hearing Committee (App. C), the Excerpts from the Brief to the Disciplinary Board (App. E), the Decision of the Disciplinary Board (App. B), the Excerpts from the Brief to the Supreme Court of Louisiana (App. G), and the Decision of the Supreme Court of Louisiana (App. A). After judgment of permanent disbarment, Petitioners bring this writ of certiorari in this Court.

ARGUMENT

REASONS FOR GRANTING THE WRIT

Public perception of the lawyer as motivated by unprincipled greed without any anchor in or dedication to helping others in an ethical way has led the Bar and the supreme courts of the states to a vigorous prosecution of lawyer wrongdoing. This movement of the last decade in Louisiana has taken the form of vigorous enforcement of the Rules of Professional Conduct by zealous prosecution and harsh judgment in the Supreme Court of Louisiana. Petitioners are two Lousiana recently permanently disbarred lawyers.

Due process, substantive and procedural, has always protected the citizen from unfair exercise of power by government. Courts are the great protector of the rights of citizens in their contests with governmental authority. Where the lawyer is involved, courts should be vigilant in the protection of the lawyer citizen in his contest with those who control membership in the legal profession. Courts in regulating lawyers subject to their power, no less than all government, should be controlled by substantive and procedural due process.

This case involves egregious conduct by two lawyers who over several hours sought to influence two former employees in prospective testimony before a federal grand jury. The conduct was wrong in the extreme. Between the time of the wrongful conduct and commencement of the prosecution, Louisiana amended its disciplinary rules to provide for two categories of disbarred lawyers. The two classifications of disbarred lawyers are: the disbarred and the permanently disbarred. The former could apply for readmission as previously;

the latter were enjoined from ever seeking readmission; this was new. (App. H, pp. 86a-89a). (The sanction of permanent disbarment was added to Rule XIX, Section 10, by order of the Louisiana Supreme Court dated July 19, 2001, effective August 1, 2001. (App. H, p. 93a).

The new Louisiana disbarment rules implicate due process and *ex post facto* issues which are of substantial importance to the public and the Bar.

In the broadest of thinking, this cause involves the plenary power of a court to control its Bar as opposed to the rights of citizen lawyers to practice a profession with the protection of due process of law, separation of powers and checks and balances. This is important to the courts and the Bar.

PART I

Question I Presented, Due Process

DISCIPLINARY PROCEEDINGS AGAINST LAWYERS SHOULD ACCORD LAWYERS UNDER THREAT OF DISBARMENT FULL PROCEDURAL AND SUBSTANTIVE DUE PROCESS.

This Court visited the lawyer discipline due process issue in 1968 in *In re: Ruffalo,* 390 U.S. 544 (1968) holding that a lawyer involved in disciplinary proceedings was enmeshed in matters which were "quasi criminal" and therefore entitled to procedural due process, notice and an opportunity to be heard. In 1982, the Court recognized that a lawyer had a right to have constitutional issues heard in a disciplinary proceeding. *Middlesex County Ethics Committee v. Garden State Bar Ass'n.,* 457 U.S. 423 (1982).

This petition on behalf of two disbarred lawyers asks the Court to address the further questions of whether the lawyer involved in disciplinary proceedings is entitled to both substantive and procedural due process.

Permanent disbarment is a kind of professional death sentence. Where the sanction is so high, the lawyer should know from the time of the offense forward what the possible sanction may be. *Lankford v. Idaho,* 500 U.S. 110 (1991). Not only must there be notice of the changes, but notice of the punishment as well, especially where a range of punishments might be at issue. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 574 (1996).

1. The Notice Requirement of Procedural Due Process Is Infringed by the Application of Louisiana's New Permanent Disbarment Rules to Petitioners When Those Rules Were Not in Effect at the Time of Petitioners' Wrongful Conduct.

The Court in *In re: Ruffalo, supra,* stated:

> Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. He is accordingly entitled to procedural due process, which includes fair notice of the charge. 390 U.S. at 550.

In *Ruffalo,* the Respondent was not provided with notice of the charge which led to his disbarment until after he and another witness had already testified at the

disciplinary hearing. The Court found that this constituted a procedural due process violation.

If the sanction of permanent disbarment is applied retroactively, the Petitioners are deprived of due process in that they did not have adequate notice of this potential sanction at the time of their alleged offense.

The Court in *Ruffalo* held:

> [Lawyer disciplinary proceedings] are adversary proceedings of a quasi criminal nature. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> * * *
>
> This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process. 390 U.S. at 551 [Citations omitted.]

Similarly, if the Petitioners had notice of the reach of the grievance procedure at the time they obstructed justice, at the time they pled guilty or at the time they consensually surrendered their licenses to practice law, that the penalty might be disbarment without the option to reapply after five years (permanent disbarment), they might not have committed the offense or otherwise acted. Decisions cannot later be undone; they are an inescapable part of an established record.

Therefore, as a result of procedural due process considerations, the sanction of permanent disbarment should only be applied prospectively and not retroactively to the time of the offense.

2. Fundamental Fairness In A Proceeding Involving Liberty and Property Is Incorporated Within The Concept of Due Process of Law as Understood In This Nation And Dictates That The Punishment Of Permanent Disbarment Be Known At The Time of the Offense So As To Satisfy "Fair Warning."

The United States through Article V and Amendment XIV of the Constitution is committed to requiring due process. Where a government not only terminates present employment but forecloses an entire occupational field, that action must comport with full due process of law. A citizen of this nation has a liberty and property interest in following a trade or occupation. *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999); *Application of Griffiths*, 413 U.S. 717, 722-27 (1973); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972); *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

"Fair warning" is an essential rule in all matters that involve criminal conduct. *Dobbert v. Florida*, 432 U.S. 282, 297-98 (1977). Justice Cardozo thought that: "[T]he Fourteenth Amendment proscribed certain state procedures, not because proscription was spelled out in one of the Bill of Rights but because the matter offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Com. of Massachusetts*, 291 U.S. 97, 105 (1934). Indeed, the idea of "fair warning" is "implicit in the concept of ordered 'liberty.' " *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Incorporation of fundamental ideas implicit in the concept of ordered liberty is an ongoing process.

Where liberty and property legally are protected, wrongful conduct and the penalty for wrongful conduct are twined in any rule or statute. This exists because of the requirement of a "fair warning." It is part of our concept of "ordered liberty." To denounce conduct and change the penalty after the conduct and then enforce the change is to abandon that concept of "ordered liberty," which is fundamental and protected by due process in this nation.

"Fair warning" embraces notice of punishment. *Lankford v. Idaho, supra; BMW of North America v. Gore, supra.*

3. The Louisiana Unitary System of Lawyer Discipline is Constitutionally Flawed Because of Violation of the "Impartial Tribunal" and the "Appearance and Reality of Fairness" Due Process Requirement: Absence of a Wall Between Prosecution and Adjudication.

Courts have always had plenary power to control who might appear before them. The power is inherent. The Louisiana Supreme Court sits in judgment in these Louisiana disciplinary matters. The Supreme Court appoints the Disciplinary Board which reviews facts. (App. H, p. 82a). The Board appoints hearing committees which find facts. (App. H, p. 83a). The Board appoints Disciplinary Counsel, with the approval of the Supreme Court (App. H, p. 85a). The Disciplinary Counsel prosecutes. Prosecution and adjudication are tied to the Louisiana Supreme Court. This combines prosecution and adjudication in the judiciary in a system without checks and balances or review outside the judicial department. It lacks that appearance of fairness which the citizen is entitled to expect from government.

The concern about the military writing the rules for military conduct and then acting as prosecutor and judge of errant servicemen led to the Uniform Code of Military Justice with its panoply of protections against dangers inherent in the closeness of the prosecutor and judge relationship. Administrative agencies acting as prosecutors and judges in controversies emanating from the alleged violation of agency rules and regulations led to the Administrative Procedure Act in the federal system and like statutes in the states. In every case there remained an appeal to the courts. With respect to lawyer discipline, a "unitary" system eliminates all of the protections accorded under a system controlled by laws like the Administrative Process Act.

Historically, in Louisiana and in other states, the Bar Association initiated prosecutions based on complaints and acted as prosecutor in the state supreme court. The inadequacy of this system to police the Bar led to its scrapping in favor of this new "unitary " system. However, the old system did provide for a separation of power with its inherent checks. The new "unitary" system lacks any of the protections inherent in the concepts of separation of powers and checks and balances.

In a system where the Disciplinary Board and the Prosecutor are linked through the appointive power of the Supreme Court, prosecution and adjudication may reflect the philosophy and prejudices (if any) of a majority of the court. This is an unconstitutional closeness of prosecution and adjudication. The fact that Rule XIX Section 2 (App. H, p. 81a) states that within the Board, the "Prosecutorial and adjudicative functions are to be separate within the agency insofar as practicable in order to avoid unfairness," does not meet the issue. It does recognize the issue. The issue is the link between the Louis-

iana Supreme Court, the Lawyer Disciplinary Board and the Disciplinary Counsel (prosecutor) in the possible merging of the prosecutorial and adjudicative functions.

Counsel is not accusing anyone of unfairness. Rather, the system as conceived is constitutionally flawed because the system does not give the "appearance of fairness" which a lawyer accused of wrongdoing is entitled to expect. "A fair trial in a fair tribunal is a basic requirement of due process." *In re: Murchison,* 349 U.S. 133, 136 (1955). "Our system has always endeavored to prevent the probability of unfairness." *Ibid; Winthrow v. Larkin,* 421 U.S. 35 (1975). "Justice must satisfy the appearance of justice." *Offut v. United States,* 348 U.S. 11, 14, (1954).

In this case, where the Supreme Court appoints the Board and approves the selection of the prosecutor and clothes the Hearing Committee's findings with the clearly erroneous rule and then decides, there is no check or balance outside of the court. The fit is too close to satisfy "fairness."

It must never be forgotten that in the normal administrative agency determination where the prosecutorial and adjudicative functions overlap, there remains the check through an appeal to the judiciary which is an independent branch of government outside the administrative agency or executive department. Since that outside check is absent, the greater must be the assurance of a system of initial and internal fairness. *Goldberg v. Kelly,* 397 U.S. 254, 271 (1970): *Marshall v. Jerrico,* 446 U.S. 238, 242 (1980); *Schweiker v. McClure,* 456 U.S. 188, 195 (1982).

4. Full Due Process both Procedural and Substantive in Quasi Criminal Proceedings Requires Proof Beyond a Reasonable Doubt and Voids Standards Such As "Clear and Convincing Evidence," "Moral Fitneess Necessary to Practice Law" and "Fitness as Lawyers." These Terms Are Vague and Void; They Permit the Intrusion of Subjective Judgment by the Fact Finder.

The proceedings herein are quasi criminal and Petitioners are entitled to the protections of substantive and procedural due process of law protected both in the Louisiana and Federal constitution. *In re: Ruffalo, supra; Application of Gault,* 387 U.S. 1, 33 (1967). The applicable standard by which Petitioners should be judged is proof beyond a reasonable doubt inasmuch as these are quasi criminal proceedings. To use any other standard is a denial of due process of law. *In re: Winship,* 397 U.S. 358, 364 (1970).

The terms "clear and convincing evidence," "moral fitness necessary to practice law," and "fitness as lawyers" (App. A, pp. 5a, 18a, 6a) are vague, indefinite and ill-defined standards. They create a Kafkaesque subjective web. The standards are so subjective that they can result in a violation of due process of law by reason of vagueness. *Musser v. Utah,* 333 U.S. 95, 97 (1948); *Cantwell v. Connecticut,* 310 U.S. 296, 308 (1940); *Winters v. New York,* 333 U.S. 507, 515-516 (1948); *Colten v. Kentucky,* 407 U.S. 104, 110 (1972); *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972); *Smith v. Goguen,* 415 U.S. 566 (1974). The terms are empty vessels that become a vehicle for the fact finder's subjective beliefs and interpretations.

PART II

Question II Presented, *Ex Post Facto*

BECAUSE LAWYER DISCIPLINARY PROCEEDINGS ARE QUASI CRIMINAL, THEY CANNOT INCREASE PUNISHMENT *EX POST FACTO* WITHOUT VIOLATING THE U.S. CONSTITUTION, ARTICLE I, § 10, CLAUSE 1.

"The focus of *ex post facto* inquiry is . . . whether any such change . . . increases the penalty by which a crime is punishable." *California Department of Corrections v. Morales*, 514 U.S. 499, 506 (1995); *Garner v. Jones*, 529 U.S. 244 (2000).

The Supreme Court of Louisiana recognizes in its decision in this case that something in a new rule which "increases the penalty by which the conduct is punishable" will violate the *ex post facto* prohibition. (App. A, p. 10a). The Louisiana Supreme Court indicated that because it always had the power to disbar attorneys permanently, the change of the rule on five year application for readmission to a rule of permanent disbarment in certain egregious cases was a procedural change only. (App. A, pp. 11a, 12a). This is a Frankfurter procedural/substantive or substantive/procedural dichotomy. The conclusion remains that Petitioners under the system in effect when they broke the law and opened themselves to the possibility of disbarment would have permitted them to apply for readmission after five years disbarment with the Louisiana Supreme Court having still the discretion of whether or not to allow readmission to the Bar. The fact that the Louisiana Supreme Court had the power to prohibit readmission does not alter the *ex post facto* issue. A legislature has the power to increase the punishment for a crime at any time. The issue is retroactivity to the offense.

The language changes in the disbarment rule effective August 1, 2001 after Petitioners offense and prosecution are set forth in the opinion of the Supreme Court of Louisiana (App. A, p. 8a).

By abolishing the privilege of applying for readmission after five years, the disbarred Petitioners face a change in the rules which reflects an increase in the penalty by which their crime is punished. Petitioners can never apply for readmission. When Petitioners wrongfully sought to influence witnesses in their federal grand jury testimony, if disbarred they could apply for readmission after five years. That is now foreclosed. At the time they did wrong, Petitioners had not been warned by effective new rules that they might be permanently disbarred.

"Fair Warning" is the basis of the American commitment to the *ex post facto* prohibition. *Dobbert v. Florida*, 432 U.S. 282, 297-98 (1977). The commitment to a "fair warning" is rooted in Western and American political and legal thought, Story, *Commentaries on the Constitution of the United States*, Section 1367 (1833). Retroactivity was condemned by the *Corpus Juris* of Justinian and the canon law and is the root of the phrase "*Nulla Poena Sine Lege.*" Schwartz, *Commentaries on the Constitution of the United States*, Part III, Rights of the Person, Chapter 151, Section 392 (1968). Schwartz cites Radin, *Handbook of Roman Law*, 475 (1927), and 1 Blackstone, *Commentaries on the Law of England*, 46 (1765).

In *Federalist Papers, No. 44*, Madison declares that *ex post facto* laws "are contrary to the first principles of the social compact and in every principle of sound legislation." He declares that the prohibition is part of the "spirit" and scope of our "fundamental charters." Prohibition of

ex post facto laws was needed to erect "additional fences" against "dangers." Madison describes these fences as part of a constitutional barrier in favor of personal security and private rights. *Calder v. Bull,* 3 U.S. 386, 390, 3 Dall. 386 (1798), declared that *ex post facto* laws included laws which aggravated a crime and made it greater than it was when committed or changed the punishment and inflicted a greater punishment than the law annexed to the crime when committed.

Afterwards, in *Fletcher v. Peck,* 10 U.S. 87, 6 Cranch 87 (1810), it was held that *ex post facto* laws included those laws which rendered an act punishable in a manner in which it was not punishable when committed. See also, 1 Kent, *Commentaries on American Law,* 382 (1826). It can be seen from this thinking that the prohibition extends not only to making criminal, conduct which at the time it was conducted was not punishable, but also to increasing of punishment after the commission of the crime.

The Louisiana Supreme Court has many times set forth the rule that while lawyer disciplinary proceedings are primarily for the protection of the public, they are also punishment of the defaulting lawyer. *In re: Vaughan,* 2000-1892 (La. 10/27/00), 772 So.2d 87; *In re: Taylor,* 2000-2392 (La. 10/13/00), 770 So.2d 335; *In re: Estiverne,* 1999-0949 (La. 9/24/99), 741 So.2d 649; *In re: Ashy,* 1998-0662 (La. 12/1/98), 721 So.2d 859. Disciplinary proceedings involve punishment. All criminal laws exist for the protection of the public and part of the protection for the public is punishment of the offender. In this case, the amendment to Louisiana Supreme Court Rule XIX was passed after the date of Petitioners' offense, it relates to the offense and its

punishment and alters the situation of the accused Petitioners to their disadvantage. The permanently disbarred Petitioners may never apply for readmission. That was not the rule when they committed their offenses. See also, *State v. Jordan*, 440 So.2d 716, 718 (La. 1983); *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

Johnson v. United States, 529 U.S. 694 (2000) involved an *ex post facto* challenge to a federal statute which authorized a district court to impose an additional term of supervised release upon violation of the initial release conditions. The Court noted that the *ex post facto* law question is whether a party is made worse off by the application of the new law. In this case, it is clear that Petitioners who lose the option of applying for readmission are "worse off." Petitioners are "worse off" even though their conduct occurred prior to August 1, 2001 when the Rule changed.

Lynce v. Mathis, 519 U.S. 433 (1997) involved a post conviction Florida statute which cancelled a prisoner's release credits which had been awarded to alleviate prison overcrowding. The Court held that this violated the *ex post facto* prohibition because it "must disadvantage the offender affected by it." *Id.* at 896, citing *Weaver v. Graham, supra.* Indeed, the Court relies upon the fundamental viability of *Calder v. Bull, supra.*

The right of Petitioners to seek readmission after five years is analogous to a prisoner seeking parole after serving a portion of his sentence. Changing the right to seek parole after serving a portion of the sentence offends *ex post facto* precepts. The prisoner is entitled to the benefit of the parole statute in effect at the time of his

offense where parole is discretionary. In this case, Petitioners are like the prisoner seeking parole; they could come to the Supreme Court of Louisiana after five years and seek readmission and the court in its discretion might grant or deny the readmission application.

CONCLUSION

For the various reasons set forth above, this petition for certiorari should be granted.

Respectfully submitted,

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